UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

BAY AREA HEALTHCARE GROUP, LTD., d/b/a CORPUS CHRISTI MEDICAL CENTER	**Case No. 16-CA-105302**
COLUMBIA RIO GRANDE HEALTHCARE, L.P., d/b/a RIO GRANDE REGIONAL HOSPITAL	**Case No. 16-CA-105309**
EL PASO HEALTHCARE SYSTEM, LTD., d/b/a LAS PALMAS MEDICAL CENTER, A CAMPUS OF LAS PALMAS DEL SOL HEALTHCARE	**Case No. 16-CA-105485**
EL PASO HEALTHCARE SYSTEM, LTD., d/b/a DEL SOL MEDICAL CENTER, A CAMPUS OF LAS PALMAS DEL SOL HEALTHCARE	**Case No. 16-CA-105525**

and

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTHCARE TEXAS

Eva Shih, Esq., Counsel for the General Counsel.
Manuel Quinto-Pozos, Esq., Deats Durst Owen & Levy, PLLC, Counsel for Charging Party.
Nancy Patterson, Esq., and *A. John Harper, Esq., Morgan, Lewis & Bockius LLP,* Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on September 29, 2014 in San Antonio, Texas. The Consolidated Complaint issued on September 27, 2013[1] and was based upon unfair labor practice charges that were filed on May 15 and May 17 by Service Employees International Union Healthcare Texas, herein called the Union. The Complaint alleges that Bay Area Healthcare Group, Ltd., d/b/a Corpus Christi Medical Center, herein called Corpus Christi, Columbia Rio Grande Healthcare, L.P., d/b/a Rio Grande Regional Hospital, herein called Rio Grande, El Paso Healthcare System, Ltd., d/b/a Las Palmas Medical Center, A Campus of Las Palmas Del Sol Healthcare, herein called Las Palmas, and El Paso Healthcare System, Ltd., d/b/a Del Sol Medical Center, a Campus of Las Palmas Del Sol Healthcare, herein called Del Sol, and collectively as the Respondents and/or the Hospitals, each violated Section 8(a)(5)(1) of the Act[2] by failing to continue in effect all the terms of their contracts with the Union by unilaterally implementing a Time Away from Work Program, herein TAFW, to replace the Extended Illness Bank (EIB), Article 38 of their contracts with the Union, without the Union's consent. While admitting that they replaced the EIB plan with the TAFW

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2013.

[2] At the conclusion of the hearing, Counsel for the General Counsel amended the Complaint to also include an allegation that this change also violated Section 8(d) of the Act.

plan, Respondents defend that this was permitted by their contracts with the Union.

I. Jurisdiction and Labor Organization Status

Respondents admit, and I find, that each has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has been a healthcare institution within the meaning of Section 2(14) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

The Union was certified as the exclusive collective bargaining representative of certain employees at each of the hospitals involved herein, although there are slight differences in the dates of certifications, the appropriate unit, and the effective dates of the contracts. The Union was certified by the Board as the representative of the Corpus Christi employees on June 3, 2010 for the unit set forth below, and the contract between the parties was effective February 16, 2012 through May 31, 2014. For Rio Grande, the certification date was July 7, 2010, for the unit set forth below, and the contract was effective from February 16, 2012 through May 31, 2014. For Las Palmas, the certification date was May 28, 2010, the unit is set forth below, and the term of the contract was February 16, 2012 through May 31, 2014. For Del Sol, the Union was certified on May 26, 2010 in the unit set forth below, and the term of the contract was February 16, 2012 through May 31, 2014. The sole allegation herein is that on about April 7, the Respondents each replaced the EIB, Article 38 of each of the contracts, with the TAFW, Short Term Disability Plan, without the consent of the Union, in violation of Section 8(a)(5) and (1) and 8(d) of the Act.

Stipulated Facts

The parties agreed that each of the following constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

For Corpus Christi: All full-time, part-time, and PRN employees employed by Corpus Christi Medical Center in the service and maintenance, technical, and skilled maintenance bargaining units, excluding all other employees, confidential employees, registered nurses, professional employees, business office clerical employees, managerial employees, guards and supervisors.

For Rio Grande: All full-time, part-time, and PRN employees employed by Rio Grande Medical Center in the service and maintenance, technical bargaining units, and skilled maintenance bargaining units, excluding all other employees, confidential employees, registered nurses, professional employees, business office clerical employees, managerial employees, guards and supervisors.

For Las Palmas: All full-time, part-time, and PRN employees employed by Las Palmas Medical Center in the service and maintenance, technical, skilled maintenance, and business office clerical bargaining units, excluding all other employees, confidential employees, registered nurses, professional employees, managerial employees, guards and supervisors.

For Del Sol: all full-time, part-time and PRN employees employed by Del Sol Medical Center in the service and maintenance, technical, and skilled maintenance bargaining units, excluding all other employees, confidential employees, registered nurses, professional employees, business office clerical employees, managerial employees, guards and supervisors.

Each of these Stipulations also states that it shall also apply to any employees who are added to the bargaining units by unit clarification, accretion, and/or agreement by the parties. The Stipulation further states that each hospital's contract contains an EIB provision in Article 38 of the contract which provides income continuation benefits for certain employees in certain circumstances, with the following Plan Modification language:

> The Hospital agrees to maintain the EIB plan described herein for the duration of this Agreement. However, changes and/or substitutions to such plans may be made provided the Hospital: (a) affords the Union 60 days' notice of a change; (b) agrees to bargain with the Union over the effects of the changes and/or substitutions, and (c) the change(s) and/or substitution either (1) apply prospectively (i.e., current employees maintain the current benefit), or do not result in a material and substantial decrease in the overall plan benefit.

The Corpus Christi EIB policy, set forth in Article 38 of its contract with the Union, includes the following provisions: (i) accrual rate of 3.08 hours per pay period; (ii) maximum benefit of 480 hours; (iii) waiting period of 24 consecutive hours; (iv) use for dependent care available to 80 hours maximum; (v) medical verification can be required; (vi) only full-time employees eligible.

The Rio Grande EIB policy, also set forth in Article 38 of its contract with the Union, includes the following provisions: (i) accrual rate of 3.076 hours per pay period; (ii) maximum benefit accrual of 840 hours; (iii) waiting period of three eight-hour or two twelve-hour shifts; (iv) no use for dependent care; (v) medical verification can be required; (vi) 90 day waiting period before available; (vii) only full-time employees eligible, but part-time employees who work at least 20 hours eligible if they had hours in the EIB before taking part-time status (but do not accrue additional EIB hours).

The Las Palmas EIB policy and the Del Sol EIB policy, also set forth in their contracts with the Union, both include the following provisions: (i) an accrual rate of 2.77 hours; (ii) maximum benefit accrual of 867 hours; (iii) waiting period of 16 consecutive scheduled work hours; (iv) no use for dependent care; (v) written medical verification can be required; (vi) 90 waiting period before eligible;(vii) only regular full-time employees eligible.

The EIB plans for each of these Hospitals were self-administered.

The Stipulation continues that on January 3, 2013 Corpus Christi and Rio Grande provided the Union with notice of its intent to change-over from EIB to TAFW, while Las Palmas and Del Sol gave this notice on January 30, 2013 and that each Hospital operates on a bi-weekly pay period making each "pay period" under the respective EIB policy two weeks.

On February 7, 2013, the Union made a written request to bargain regarding Respondent's proposed EIB plan changes, and a meeting was held between the Hospitals and the Union regarding the intended changes, and information was provided by the Hospitals to the Union regarding the changes before, during and after the meeting.

Corpus Christi, Rio Grande, Las Palmas and Del Sol each implemented an identical TAFW program on April 7, 2013. As implemented, the TAFW program regarding short-term disability ("STD") includes the following provisions: (i) effective 30 days after hire; (ii) covers full and part time employees; (ii) requires a 7 day calendar waiting period; (iv) provides coverage only for employees; (v) provides up to 20 weeks of benefits for each separate illness or injury; (vi) pays 60% of base wages for employees with 0-5 years of service (who may elect "buy up" to 80%, at their expense), 80% of base wages for employees with 5-9 years of service, and 100% of base

wages for employees with 10 years or more of service.

These plans are administered by Sedgwick, a third-party plan administrator. As of April 9, 2013, employees no longer accrued EIB hours under TAFW.

Testimony

Michael Lamond, the Director of Labor Relations for Corpus Christi, Amparo Enchinton, Organizer and Representative for the Union, Charlene Jones, the Director of Employee Benefits for HCA Management Services, which manages the health and group benefit plans for HCA affiliated facilities, including the four hospitals herein, and Paul Hitchcox, actuary who participated in the development of the TAFW program, each testified about the operation of, and benefits afforded by, EIB and TAFW.

Lamond testified that on March 14, representatives of the four hospitals met with Union representatives to discuss the proposed changes to EIB. The hospitals gave a fifteen to twenty minute presentation explaining how the new program changed the benefits from the EIB program, at the conclusion of which the Union representatives requested a caucus. When they returned, they asked additional questions about the proposed changes to the plan and its benefits, which the hospitals' representatives answered. In addition there was a discussion about extending the deadline for employees to purchase the supplemental insurance buy-up option, which allowed employees with up to five years of service, who were to receive sixty percent of wages if they were eligible for the benefit under TAFW, to elect to purchase an additional twenty percent at their expense, to bring their benefit to eighty percent.[3] At this meeting, the hospitals agreed to extend the deadline for this purchase from the following day to the end of the month. Between the date of that meeting and April 4, the Union requested certain information regarding the proposed changes, which the hospitals responded to. On April 7, the hospitals implemented the change from EIB to TAFW and since that date all existing employees and new employees have been given literature and/or Power Point presentations describing the TAFW and short-term disability program.

As regards the difference between EIB and TAFW, Lamond testified that while EIB covered full-time employees, TAFW covered full-time and part-time employees; TAFW had no coverage for illness for family members or dependents, although an individual employed at Corpus Christi could use up to eighty hours of accrued EIB benefits for illness for family members or dependents. TAFW has a seven day waiting period before employees are eligible to receive benefits so that if an eligible employee under the new plan was hospitalized for eight days, he/she would receive benefits for one day, but could use paid time off (PTO) that he/she had accrued to cover some or all of the other days. He testified that with hospitalizations under EIB, coverage began immediately, so that same employee would receive eight days of pay.

Enchinton was employed at Del Sol as a surgical technologist for about ten years prior to her employment with the Union in 2011. She testified that after receiving notice from the Hospitals about the proposed changes to EIB, she wrote to Leonard Ochart, Labor Relations Director for Las Palmas and Del Sol on February 7:

I am in receipt of your January 30 email concerning the proposed benefit plan changes.

[3] Under TAFW, eligible employees with five to ten years of service receive eighty percent of their wages, but cannot purchase the supplemental buy-up insurance. Eligible employees with ten years or more of service receive one hundred percent of wages under the new plan.

> Please be advised that the position of the union is that this issue is addressed in Article 37 Section 10 and Article 38 Section 6 of the Collective Bargaining agreement in effect between the parties, and that the proposed change is a unilateral change in violation of the contract. The company is not at liberty to unilaterally disregard the provisions bargained for in the contract. Therefore, the union demands that you cease any implementation of these proposed changes and that if the company desires to move forward with changes to the benefit plan, the union requests that the company bargain any such changes prior to any implementation.

The parties met on March 14, at which time the Respondent's representatives gave a presentation of the TAFW plan and the changes that it would entail. At the conclusion of this presentation, the Union representatives caucused and prepared questions for the Respondent's representatives. When they returned, they asked these questions, including whether payments to the employees would be made in a timely manner (the answer was that there would be no delay in payments as Sedgwick was timely and efficient), and whether intermittent (not hospitalization) leave would be affected, and the response was that it would be as TAFW did not cover intermittent leave. At the Union's request, on March 15 Ochart sent an email to Enchinton stating: "As we continue to discuss the PTO EIB proposals, it would be appropriate if the Supplemental 20% sign up period be extended" and on March 20, the Vice President of Human Resources for Las Palmas and Del Sol sent emails to the employees notifying them that the enrollment period for the Supplemental Short-Term Disability Plan was extended to March 31. After the implementation of TAFW she requested to meet with Ochart and asked if they would reverse the implementation of TAFW and if they would allow employees to use banked EIB hours for family members. Ochart told her that he didn't have control of that; it was a corporate decision.

She testified further that during her ten year employment period with Del Sol, she used her EIB benefits on a number of occasions. On each of these occasions he was required to complete one page of an application with her physician completing the other pages stating that she was under his care. During the period that she was absent from work she continued to receive her paycheck from the hospital with the regular deductions, and without any delay; she was never denied her EIB benefits. She was hospitalized sometime prior to 2002, but cannot recollect the amount of time that she was in the hospital or under the doctor's care, but she had accrued a sufficient amount of time under EIB to cover it. Prior to the birth of her son in 2002 she took a month off and was paid for this time with her accrued EIB hours. She returned to work for about three weeks and, after giving birth, she was out of work for about six weeks and was reimbursed for this time as well with EIB as well as her PTO accumulated hours. In addition, in 2006 she was out for two one week periods and on both occasions her EIB bank covered her full pay during these periods, and in 2006 she was out on bed rest for a period of time and had to use sixteen hours of PTO to supplement her EIB benefits.[4]

Jones testified that she is familiar with the functionality of the EIB program, but as it was administered on a local level she is not familiar with the accruals under that plan, although she is familiar with the TAFW plan which employees are eligible for after thirty days' employment. She testified that under the new plan, employees would be entitled to six weeks' paid leave for a normal childbirth, after the required seven day unpaid waiting period; if she obtained a medical certification from her physician that her medical condition required longer than that period, she could be paid for up to twenty weeks for the delivery. That twenty week maximum is per event,

[4] Under the EIB plan, employees on EIB leave continue to accrued PTO; under the TAFW plan, they do not accrue PTO while on TAFW leave.

not per year. She testified: “I could go out and have that baby, and come back to work for two months and then have a car accident, and have another up to 20 weeks of pay, with the appropriate disability…and medical certification.” She testified that the hospitals’ records indicate that no employee with the appropriate medical certification has been denied maternity leave in excess of six weeks.

She testified, as well, that as Sedgwick is the third-party administrator of TAFW, the Hospitals are no longer processing the employees’ regular paychecks during hospitalizations. Under the new system the medical documentation forms are sent to the employees either by fax, email or are mailed to the employee by Sedgwick, and Sedgwick has forty eight hours to provide the employees with these forms. So long as these forms are returned five days prior to the date that the checks are issued, the employee will receive his/her check at the regular time. If not, they will receive “an off-cycle check…as soon as administratively possible.” There is an exception for the deduction of employees’ health insurance premiums, however. She testified that as Sedgwick does not know what the deductions are, the hospitals employ another vendor, Bconnected, which sends a bill to employees for the amount of the health insurance premium, to be paid directly to Bconnected. Under EIB, while out, the employees received an invoice from their employer which paid the carrier directly. While the payment method has changed under TAFW, the amount to be paid remains the same. In addition, employees who had accumulated, but unused time under EIB, would receive “100% replacement pay” for their first time out under TAFW.

Hitchcox, who is employed by Trion, a subsidiary of Marsh & McLennan, has been employed as an actuary for thirty four years and was involved in working with the Respondent’s EIB programs. In addition, he has been involved in TAFW: “Just to develop a program that could provide a longer period of benefits to employees if they became disabled.” In preparation for this hearing, at the request of counsel for the Respondents, he did analyses of the EIB and TAFW plans at the Hospitals. His testimony included graphs and diagrams in which he compared the number of employees covered under each plan, the number of leaves and claims under the plans, and the cost of these plans to the hospitals. The period of time covered in these analyses was generally 2010 through April 7, 2013, for EIB, and the one year period after April 7, 2013, the effective date of TAFW. He testified that employees accrued hours under EIB and when they were out on approved leaves, they received 100% wage replacement for that leave until they used up their accrued hours; when the hospitals switched to TAFW, these accrued hours were carried over to the new program with no loss to the employees and was renamed: “100% wage replacement hours.” TAFW is “service based,” so the benefit depends upon the employee’s length of service; employees with up to five years of service receive sixty percent wage replacement, between five and ten years, eighty percent, and in excess of ten years, one hundred percent wage replacement.

Eligibility: Under EIB, employees at Corpus Christi were eligible to participate in the plan immediately upon employment; for the other three hospitals, they were eligible after ninety days of employment. Under TAFW employees are eligible after thirty days of employment. EIB covered only full-time employees; TAFW covers full-time and part-time employees.

Physician’s Statement: Both plans require a physician’s statement supporting the leave request,

Individual or Family Coverage: Under EIB, Corpus Christi provided benefits to the employees and permitted the employees up to eighty hours of leave (assuming that they had accumulated that much leave at the time) to spend for a family member who was ill. For Rio Grande, Las Palmas, Del Sol under EIB, and each of the hospitals under TAFW, only the employees are covered.

Waiting (or Elimination) Period: Each of the hospitals had a waiting period before the employees became eligible to participate in the plan. Under EIB, Corpus Christi and Rio Grande had a twenty four hour waiting period, while Las Palmas and Del Sol had a sixteen hour waiting period. Under TAFW the waiting period for each of the Hospitals is one work week.

Accrual of Hours: As EIB is an accrued benefit, employees accrued EIB hours (ranging from 2.77 to 3.08) per pay period. The maximum number of accruable hours varied by hospital: Del Sol and Las Palmas allowed a maximum of 867 hours, while Corpus Christi allowed up to 480 and Rio Grande, up to 840. At the time of the changeover from EIB to TAFW, one hundred sixty one employees of the Hospitals had no EIB accrued balance, three hundred three had two weeks or less accrued balance, two hundred sixty five had between two weeks and six weeks accrued balance, and one hundred twenty three had in excess of twenty weeks coverage. Under TAFW there is no longer an accrual of hours. As stated above, the hospitals pay from sixty percent to one hundred percent wage reimbursement depending upon the length of service of the employee. As part of his analysis, Hitchcox found that on April 7, the average number of accrued hours under EIB varied from 192 at Del Sol to 312 at Rio Grande. While EIB coverage was limited to the employees' accrued EIB hours, TAFW pays for up to twenty weeks of coverage[5] for each occurrence. Hitchcox prepared a chart that is meant to show the average loss of income under EIB as compared to TAFW. After the waiting period discussed above, he concluded that, under EIB, the average employee would receive one hundred percent of almost seven weeks of pay, while under TAFW, the average employee, after the one week waiting period, would receive 60%, 80% or 100% of their pay, depending upon years of service, for up to twenty weeks' absence, with a physician's statement affirming the need for that amount of time off. Hitchcox found that at the time of the changeover from EIB to TAFW, eight hundred fifty seven, or forty eight percent of the employees had five years or less employment at the Hospitals, with an average of two weeks of EIB time accrued, four hundred thirty one or twenty four percent had from five to ten years of employment, with an average of eight weeks of EIB time accrued, and five hundred nine, or twenty eight percent, had in excess of ten years employment, with an average of thirteen weeks EIB time accrued. From these figures, Hitchcox concluded that under EIB, the first group would have one hundred percent of their benefits paid for two weeks, while under TAFW they would have sixty percent of the benefits paid for up to twenty weeks. Under EIB, the second group would have one hundred percent coverage for eight weeks while under TAFW they would have eighty percent coverage for up to twenty weeks, and for the final group, under EIB, they would have one hundred percent coverage for up to thirteen weeks' coverage, while under TAFW they would have one hundred percent coverage for up to twenty weeks. In addition, those employees with an EIB balance at the time of the changeover, could use that entire balance to supplement their TAFW benefit.

Claims: Both before and after April 7, the Hospitals employed approximately one thousand five hundred employees who were eligible to participate in the plans. During the years 2010, 2011 and 2012 there were, on average, four hundred seventy one leaves under EIB, costing the hospitals approximately $600,000 to $700,000 yearly. For the period April 7, 2013 through April 6, 2014, under TAFW, two hundred twenty one submitted two hundred sixty one leave requests, of which one hundred ninety seven were approved and sixty four were denied. Of the sixty four, thirty eight of these were denied for the failure to supply medical information, fifteen for an incomplete application, seven because the employee returned to work during the waiting period, three because the application did not support a disability and one was a plan exclusion.

[5] Hitchcox testified that "very few employees, if any" received the full twenty weeks of coverage.

Hitchcox prepared a summary and chart, by hospital, showing what employees of the hospitals actually received in TAFW benefits for the period April 7 through April 6, 2014, as compared to what they would have received for that period under EIB. Rio Grande had forty seven approved leaves during that period for which they were paid a total of 229.4 weeks of benefits. According to his calculation, for the same claims, 130.2 weeks of benefits would have been paid under the EIB plan. Del Sol had fifty nine approved leaves during the period in question for which they paid 356 weeks of benefits. These claimants would have received 175 weeks of benefits under EIB. Las Palmas had thirty seven approved leaves during that one year period for which they paid 210 weeks of benefits; under the EIB plan, these claimants would have received 113 weeks of benefits. Corpus Christi had fifty four approved leaves during this period, for which they were paid 319 weeks of benefits. The same claims under EIB would have been paid 130 weeks of benefits. Finally, Hitchcox took the actual cost of the TAFW benefits for the year beginning April 7, $683,342 and compared it to the projected total cost for EIB for the same period, which he determined to be $667,663. He also broke this down by hospital and determined that the actual cost of TAFW benefits for the period of April 7 through April 6, 2014 as compared to the projected cost for EIB for the same period was higher for Corpus Christi, Rio Grande and Las Palmas, while it was lower for Del Sol.

In answer to questions from Counsel for the General Counsel, Hitchcox testified that in preparing his analyses of EIB and TAFW, he relied upon information that was prepared for him by the hospitals, for the census and EIB claims, and by Sedgwick, for TAFW claims. He did not request, or receive, the number of EIB leave requests that were denied. Additionally, he could not testify to how many of the leave requests that were denied under TAFW would have been approved under EIB.

III. Analysis

The Complaint alleges that on about April 7 the Respondents failed to continue in effect the terms and conditions of employment set forth in their contracts with the Union by unilaterally implementing the TAFW program that replaced the EIB program, and it is alleged that by this act the Respondents have failed and refused to bargain collectively and in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act. Although a change such as this would normally constitute an unlawful unilateral change in violation of the Act, Article 38 of the contracts between the Respondents and the Union permits such a change if certain requirements are met: it provides that the EIB plan shall remain in effect for the duration of the agreement, although changes and/or substitutions to the plan may be made provided the Respondents: (a) afford the Union 60-day notice of the change; (b) agrees to bargain with the Union over the effects of the changes and/or substitutions; and (c) the changes and/or substitution either (1) apply prospectively (i.e., current employees maintain the current benefit), or (2) do not result in a material and substantial decrease in the overall plan benefit. The initial issue is whether the Respondents satisfied these requirements and if they did, whether that constitutes a “clear and unmistakable waiver” by the Union of its right to bargain about such a change. *Provena St. Joseph Medical Center,* 350 NLRB 808, 815 (2007). Counsel for the General Counsel, while conceding that the Respondents satisfied the requirement of (a) by giving the required notice to the Union, in her brief argues that as there was no bargaining between the parties over this change, and as the change from the EIB to the TAFW plan resulted in a substantial and material decrease in the overall benefit plan, there was no clear and unmistakable waiver by the Union.

The issue is whether the Respondent satisfied all of the requirements set forth in Article 38, Section 6. Pursuant to a request to bargain from the Union, the parties met on March 14.

After a presentation of the changes that TAFW entailed, the Union representatives asked questions about these changes which the Respondent's representatives answered. The Union representatives asked the Respondent to extend the deadline to purchase the supplemental insurance buy-up option, and the Respondents agreed to extend the deadline from the following day to the end of the month. The evidence on this issue is limited to the stipulations and some testimony from Lamond and Echinton, but there is no evidence that the Respondents refused to bargain with the Union over the effects of the substitution of TAFW for EIB; in fact, even though bargaining was limited, the parties did discuss the proposed changes, answered the Union's questions and never refused a request by the Union to bargain. Further, the Respondent agreed to extend the buy-up deadline. I find that the Respondents satisfied subparagraph (b) of Section 6. Finally, as the change in plans was applied retroactively, in order to determine whether the change in plans resulted in a material and substantial decrease in the overall plan benefit, it is necessary to examine, and compare the benefits and requirements under the EIB Plan to the benefits and requirements of the TAFW Plan.

Eligibility

EIB	TAFW
Full-time employees. Immediate at Corpus Christi; 90 days at Rio Grande, Del Sol and Las Palmas.	Full-time and part-time employees with at least 20 hours a week employment. After 30 days employment.

Waiting Period

Corpus Christi, 24 consecutive hours, Rio Grande, three 8 hour or two 12 hour Shifts; Del Sol and Las Palmas, 16 consecutive scheduled work hours.	After 1 work week.

EIB Hours Accrued Yearly and Maximum Hours Accruable

Corpus Christi, and Rio Grande, 80 with a Maximum of 480 (CC) and 840 (RG). Del Sol and Las Palmas, 72 with a maximum of 867 hours.	No accrual of hours.

Percentage Paid for Wage Replacement

100% of accrued hours.	60% for employees with less than 5 years' employment; 80% for 5 to 10 year's employment, and 100% for in excess of 10 years employment.

Period of Time Covered

Number of accrued hours.	Up to 20 weeks for each occurrence.

Family Benefits

Corpus Christi, dependent care for up to 80 hours; Others, no family benefits.	No family benefits.

Administration of Plans

Administered by each hospital.	Administered by Sedgwick, a third Party plan administrator.

Physician Statement Required

Yes.	Yes

In their post-hearing briefs, Counsel for the General Counsel and counsel for the Charging Party point to the disadvantages of the TAFW plan as compared to the EIB plan, principally the seven day waiting period before benefits kicked in, and the 60% and 80% payments to employees with fewer than ten years employment, as compared to the 100% payment to employees under EIB, assuming that they had accumulated the hours. On the other hand, counsel for the Respondents points to the advantages that the TAFW plan affords to the employees, such as that it covers part-time employees, is effective after thirty days employment, and provides coverage up to twenty weeks of coverage for each occurrence. As the other requirements of Article 38, Section 6 are satisfied, the ultimate question is whether the benefits under TAFW resulted "in a material and substantial decrease in the overall plan benefit."

The EIB plan was more beneficial to the unit employees in the waiting period before benefits kicked in (sixteen to twenty four work hours as compared to one work week under TAFW), paying 100% for accrued hours as compared to 60% to 100% under TAFW, dependent care, but only for the Corpus Christi unit employees as it covered them for dependent care for up to eighty hours, while the other hospitals and the TAFW plan did not cover family benefits, and administration of the plans might be more beneficial to the employees as there might be fewer delays in receiving their pay and benefits, although Enchinton testified that if the employees returned their paperwork in a timely manner, there would be no delay in their paychecks. TAFW was more beneficial to the employees as part-time employees working at least twenty hours a week are eligible and the period of employment required is thirty days, as compared to immediately eligible at Corpus Christi and ninety days employment at the other hospitals. In addition, the period of time covered is substantially better under the TAFW plan as it covers up to twenty weeks for each occurrence, while under the EIB plan, coverage is limited to the number of EIB hours that the employee had accrued. In determining whether the percentage paid for wage replacement favors the EIB plan or the TAFW plan, it is necessary to examine Hitchcox' analyses. He found that on April 7, 161 employees at the hospitals had no EIB balance, and would be entitled to no wage replacement under EIB, 303 employees had up to two weeks accrued EIB time, and would be entitled to up to two weeks wage replacement under EIB, and 265 employees had between two and six weeks accrued EIB time and would be entitled to from two weeks to six weeks wage replacement. All of these employees (if they satisfied the requirements of the TAFW plan) would have been entitled to from 60% to 100% of twenty week of wage replacement for each occurrence. On the other hand, the123 employees who had in excess of twenty weeks accrued EIB time, would have been entitled to 100% of twenty weeks or more of wage replacement, but only once. Hitchcox' analyses also found that on April 7, forty eight percent of the employees had been employed at the hospitals for five years or less and therefore would receive sixty percent wage replacement, twenty four percent had been employed from five to ten years and would receive eighty percent wage replacement, and the twenty eight percent of the employees who had been employed in excess of ten years would receive one hundred percent wage replacement. Finally, he found that for the one year period subsequent to the change the actual TAFW benefits paid for the Hospitals was $683,000, while he projected that for that same period of time the EIB benefits would have been $667,000.

Hitchcox' testimony was the most influential at the hearing because of his analyses and comparisons between the plans; he has been an actuary for thirty four years and is not employed by any of the hospitals. In other words, I can see no reason why I should disregard, or minimize, his findings. Although, as stated above, some EIB terms are more beneficial to the employees than the TAFW terms, absent Hitchcox' findings it is difficult to determine overall which is better for the employees. Although his analyses did not factor in a number of situations, such as the fact that under TAFW, employees do not accrue PTO hours while receiving these benefits and that employees might experience a delay in payments, and would be inconvenienced, as the hospitals no longer administer the plan, his findings clearly establish that, overall, the TAFW plan is slightly better for the employees than the EIB plan. This is set forth in the "bottom line," where he found that in its first year of operation, the hospitals paid slightly more for TAFW than he projected they would have paid for the EIB plans. Further, the standard set forth in Article 38 of the contracts requires that the change result in "a material and substantial decrease in the overall plan benefit," while the record herein establishes that there was a slight increase in the overall plan benefit. I therefore find that pursuant to the terms of Article 38, Section 6 of the contracts, the Union waived the right to bargain about this change, and I therefore recommend that the Consolidated Complaint be dismissed.[6]

Conclusions of Law

1. Each of the Respondents has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and has been a healthcare institution within the meaning of Section 2(14) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(5)(1) of the Act as alleged in the Consolidated Complaint.

On these findings of fact, conclusions of law and based on the entire record, I hereby issue the following recommended[7]

ORDER

It is recommended that the Consolidated Complaint be dismissed in its entirety.

Dated, Washington, D.C. November 21, 2014

Joel P. Biblowitz
Administrative Law Judge

[6] Having found that the Respondents lawfully substituted the TAFW plan for the EIB plan on April 7, it is unnecessary to consider the Section 8(d) allegation herein.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.